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No. 84-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN PACIFIC COMMUNICATIONS COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

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DATED: February 11, 1985

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PETITIONERS' REPLY BRIEF

In its opposition brief, respondent American Telephone & Telegraph Co. ("AT&T") has raised two legal issues that merit brief discussion.

First, AT&T contends repeatedly that the question presented to this Court involves simply a weighing of the evidence concerning Judge Richey's bias, something the Court of Appeals has already done. Therefore, because petitioner Southern Pacific Communications Company's ("SPCC") arguments supposedly concern primarily factual issues, AT&T asserts that they are somehow inappropriate for review by this Court. Opp.Br., pp. 2, 15, 17-18. This contention is meretricious. Review of a claim of judicial bias necessarily involves a careful factual inquiry concerning what the trial court did. That necessity, however, has not prevented this Court from giving

full review to bias claims in the past[1], nor should it prevent similar review now. Indeed, if AT&T is right, this Court would never review claims of judicial bias ruled on by lower courts because of the scrutiny of the record required; that, however, is plainly not the case.

Second, AT&T also mistakenly characterizes SPCC's petition as calling for a wholesale rejection of the "presumption of regularity" upheld by this Court in *United States* v. *Morgan,* 313 U.S. 409 (1941), and for a categorical shifting of the "burden of persuasion" to the party defending the conduct of an allegedly biased judge. Opp.Br., pp. 18-25. However, SPCC has advanced no such draconian argument. We recognize a presumption of regularity exists. But this Court has made it clear that it is a *rebuttable* presumption, which may be overcome if a party offers valid reasons to "suspect" that a trier of fact was "disabled" from deciding a case on the basis of the evidence presented at trial. *See Schweiker* v. *McClure,* 456 U.S. 188, 195-96 (1982); *Withrow* v. *Larkin,* 421 U.S. 35, 55 (1975). SPCC is asserting only that the presumption was rebutted here, and that the Court of Appeals improperly declined to recognize that fact.[2]

Apart from these legal "strawman" arguments, AT&T's brief is riddled with gross mischaracterizations, both of the record below and of what the Court of Appeals held. Thus, AT&T dismisses SPCC's charge of bias as "outlandish"

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[1] For prior cases where this Court has closely examined the record to resolve a claim of bias already litigated below, *see, e.g., Withrow v. Larkin,* 421 U.S. 35, 37-43 (1975); *Mayberry v. Pennsylvania,* 400 U.S. 455, 456-63 (1970); *Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145, 146 (1968); *In the Matter of Murchison,* 349 U.S. 133, 134-36 (1955); *Berger v. United States,* 255 U.S. 22, 28-30 (1921). In none of these decisions (or, indeed, in any of the decisions cited by respondents) has the Court ever intimated that the need to re-examine the record to determine if the facts sustain a bias claim will preclude review by it in the first place.

[2] AT&T spuriously charges that the petition reiterates the position advanced by SPCC to the Court of Appeals, while ignoring that court's conclusion. Opp.Br., pp. 2-14. On the contrary, SPCC clearly challenged the validity of the Court of Appeals' conclusion with respect to bias, and attacked the failure of the court below to express *any* conclusion with respect to SPCC's alternative standard of review argument. Pet. at 21-24.

(Opp.Br., p. 12), even though the Court of Appeals took this charge very seriously, considered it with "the greatest of care" (740 F.2d at 984; App. at A-4), and spent seventeen pages of its opinion discussing it. Similarly, AT&T falsely says that Judge Richey's policy views about telecommunications competition were limited to the "Conclusion" portion of his opinion (Opp.Br., pp. 7-8), even though SPCC demonstrated earlier that those views were embodied in original material interspersed throughout that opinion, thus clearly affecting his decision on all issues. Pet. at 23-30. And AT&T is also misleading when it says that the court below found Judge Richey's "resolution of the case was consistent with the highest standards of the judicial system" and that "he ruled on the merits using fully appropriate legal standards." Opp.Br., p. 25. Instead, the Court of Appeals reversed Judge Richey's findings on immunity and monopoly power, because they were tainted by legal or factual error, and severly criticized his disposition of the case[3], because it created a possible appearance of prejudice. 740 F.2d at 983-84, 995, 997; App. at A-3 to A-5, A-28, A-31. Finally, although AT&T claims that the court below ruled that the factfindings Judge Richey copied actually reflected his view of the merits and that his policy views did not substantially influence his judgment (Opp. Br., pp. 24-25), that court, in point of fact, ruled otherwise: "the public and the reviewing court can never be certain that the judge actually decided the case on the grounds given in the Memorandum Opinion." 740 F.2d at 995; App. at A-28.[4]

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[3] It should be remembered that findings by a trial judge which are unsupported by the record may also support an inference of bias. *E.g.*, *Peacock Records, Inc. v. Checker Records, Inc.*, 430 F.2d 85, 89 (7th Cir. 1970); *Blizard v. Fielding*, 454 F.Supp. 318, 321 (D.Mass. 1978), *aff'd*, 601 F.2d 1217 (1st Cir. 1979).

[4] This fact distinguishes this case from those cited by AT&T where a judge expressed strong policy views on the record. In each of those cases, it was clear (unlike here) that those policy views did *not* affect the ultimate judgment. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (it was clear that judge's pretrial rulings stemmed only from his study of the depositions and briefs); *Whitehurst v. Wright*, 592 F.2d 834, 837-38 (5th Cir. 1979) (motion for recusal under 28 U.S.C. §455 properly denied where no reasonable person would have concluded that judge favored either party); *United States v. Kelly*, 539 F.Supp. 363, 373-74 (D.D.C. 1982), *rev'd on other grounds*, 707 F.2d 1460 (D.C.Cir.), *cert denied*, 104 S.Ct. 264 (1983) (judge

(Footnote continued on following page)

In order to overcome the "presumption of regularity," SPCC relied on the interactive effect of four factors: (1) Judge Richey harbored policy views on telecommunications competition irrelevant to the case he was asked to decide (2) that substantially affected his judgment and (3) led him to copy most of AT&T's proposed findings of fact, (4) thus causing him to rule uniformly against SPCC and in favor of AT&T.

The first of these factors is undisputed, according to the Court of Appeals. 740 F.2d at 993; App. at A-23. This is a vital point, because the Court of Appeals ruled that the district court's policy views, as expressed in its opinion and during trial, *were no part* of its proper function in deciding this case.[5] Even AT&T has conceded that Judge Richey came to harbor the views ascribed to him (Opp.Br., p. 10), but blithely says they are "difficult to criticize" and "make him seem to be a prophet" (*id.*, pp. 25-26). If so, it was a false prophecy, one the Court of Appeals found to be unalterably opposed to past decisions of the FCC and the judiciary. For the purpose of any bias analysis, it does not matter if these views were developed before or during trial. The many cases cited previously by SPCC

(Footnote continued from preceding page)
specifically distinguished what was repugnant to him about the "Abscam" operation from what was constitutionally impermissible, and relied only on the latter in ruling); *Lawton v. Tarr*, 327 F.Supp. 670, 672 (E.D.N.C. 1971) (judge recognized obligation to apply laws as written without regard to personal views, cited examples where he had done so in the past, then reassigned case on other grounds without deciding merits); *Perkins v. North Carolina*, 234 F.Supp. 333, 336 (W.D.N.C. 1964) (despite personal disagreement with statute, judge recognized that he was bound by law to hold that the defendant's actions violated it).

[5] AT&T claims that four or five of SPCC's thirty-three quotes from Judge Richey in its petition are "clear distortions." Opp.Br., pp. 13 n.11. These same arguments were unavailingly made to the Court of Appeals. And as for Judge Richey's statements during trial that he would decide the case only on the evidence (*id.*, pp. 5-6 & n.8), they are entitled to little weight when juxtaposed with his final opinion, which demonstrates the decisive role his policy views actually played. *Cf. Crowe v. Di Manno*, 225 F.2d 652, 658 (5th Cir. 1955) ("Projected against this background the trial judge's frequent protestations of fairness and impartiality in his rulings, matters which should be so evident as not to require mention, to say nothing of reiteration, sound hollow indeed.")

It is true that SPCC's counsel did not openly criticize Judge Richey for his views expressed during trial. *See* Opp.Br., p. 5, n.6. But under the circumstances, they could hardly be expected to antagonize the judge in charge of deciding their case.

upheld a claim of bias where a judge's irrelevant policy views were not shown to have arisen extrajudicially. Pet. at 20-21. "A finding of bias... is not precluded merely because the judge's remarks were made in a judicial context." *Gardiner* v. *A. H. Robins Co.*, 747 F.2d 1180, 1192 (8th Cir. 1984), *citing Parliament Ins. Co.* v. *Hanson*, 676 F.2d 1069, 1075 (5th Cir. 1982). Thus, the Eighth Circuit in *Robins* disqualified Judge Miles Lord for attacking the integrity of the corporate defendant and its executives during a settlement conference, where Judge Lord's views were based not on any extrajudicial sources, but on the plaintiffs' pleadings and on deposition testimony.[6] *See* 747 F.2d at 1186, 1191 nn.14, 15, 1192. Its decision, as well as those previously cited by SPCC, cannot be reconciled with that of the court below. The District of Columbia Circuit, based on its reasoning in this case, would have relied on the "presumption of regularity" to preclude disqualification of a decisionmaker like Judge Lord. Therefore, there is a genuine conflict among circuit courts which this Court should resolve.

As noted earlier, the Court of Appeals could not say whether Judge Richey's policy views substantially influenced his decision; SPCC has demonstrated in its petition that they did. And AT&T's own lead counsel—George Saunders, Jr.—concurred with petitioners. During oral argument before the Court of Appeals, on March 20, 1984, Mr. Saunders agreed that "[w]hat happened is, the Judge became convinced during the course of the case that the FCC's policies were wrong." Transcript, p. 66. He went on to paraphrase Judge Richey as follows:

> " 'I am troubled by what has happened in this country. I am troubled by the fact that we have taken an industry like the telephone industry, which was the finest

[6] AT&T purports to distinguish *Robins* on the ground that there, Judge Lord was found to be an "advocate" for plaintiffs. Opp.Br., p. 22 n.29. Of course, the Court of Appeals here also found Judge Richey guilty of "misplaced advocacy." 740 F.2d at 984; App. at A-4.

> telephone service in the world and through use of argument, the people coming in and saying, "I got a $280 million subsidy but that was not enough. I can't compete. I want AT&T not to be able to raise their rates and I wanta get local loops even cheaper and that is the only way I can make money." '
>
> "And what Judge Richey is saying at the conclusion of the case is, 'For goodness sakes, if that is what we have done, it is insane.' " (*Id.*, p. 67.)

This is hardly the appropriate basis for deciding a major antitrust case that required the expenditure of five years, millions of dollars, and the time of hundreds of attorneys. Given the consensus between SPCC's and AT&T's counsel about why Judge Richey ruled as he did, there was certainly enough present in this record to provoke the suspicion that the district court's views substantially influenced its decision, as *Withrow* v. *Larkin* and *Kotteakos* v. *United States,* 328 U.S. 750 (1946), require.

Coupled with the foregoing factors was Judge Richey's copying of AT&T's partisan, one-sided proposed findings of fact. Standing alone, this factor would concededly not justify a determination of bias. However, when viewed in context, Judge Richey's copying fairly raised an issue as to his impartiality. As one court has said:

> "The adequacy of findings is more apt to be called into question when the trial judge—as was done here—adopts verbatim the proposed findings and conclusions of prevailing counsel because more likely than not counsel, 'and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can.' . . . The result is that when the trial court adopts the proposed findings of counsel, losing counsel may well forfeit his 'undeniable right . . . to be assured that his position has been thoroughly considered [;] . . . the independence of the court's thought process may be cast in doubt'; and the reviewing

> court may well be left without a clear understanding of the trial court's basis for decision." (*Askew* v. *United States,* 680 F.2d 1206, 1209 (8th Cir. 1982); footnote omitted.)

Accord, e.g., Garter-Bare Co. v. *Munsingwear, Inc.,* 650 F.2d 975, 980 (9th Cir. 1980); *Amstar Corp.* v. *Domino's Pizza, Inc.,* 615 F.2d 252, 258 (5th Cir.), *cert. denied,* 449 U.S. 899 (1980); *James* v. *Stockham Valves & Fittings Co.,* 559 F.2d 310, 314 n.1 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978); *Industrial Bldg. Materials, Inc.* v. *Interchemical Corp.,* 437 F.2d 1336, 1339-40 (9th Cir. 1970). Here, as the Court of Appeals found, one cannot deny the possibility that Judge Richey adopted AT&T's proposed findings because his policy views were inimical to telecommunications competition and because he wanted to have an opinion so layered as to be "appeal proof."

When all the foregoing factors are considered together, there exists the distinct suspicion that Judge Richey did not decide this case impartially, a suspicion which the Court of Appeals candidly acknowledged. That court also conceded that the public might perceive that the district court's policy views led it to decide this case on impermissible grounds. 740 F.2d at 984; App. at A-3 to A-4. The Court of Appeals declined to grant SPCC's requested relief only because the evidence allegedly failed to establish conclusively that Judge Richey tried this case with an "irrevocably closed mind." We submit that this was too rigorous a standard to apply in light of the teachings of *Schweiker* v. *McClure* and *Withrow* v. *Larkin.* The "presumption of regularity" need not be conclusively disproved; it is enough if a party adduces sufficient evidence to support the suspicion of a reasonable person that a case was not decided on the basis of the evidence alone. The court below itself acknowledged that SPCC had done at least that much; to require more was to, in effect, nullify SPCC's constitutional right to a fair trial by imposing a "burden of persuasion" that could never be totally satisfied.

At the very least, what SPCC showed should have entitled it to a relaxed standard of review, as set forth in *Kotteakos* v. *United States.*[7] The Court of Appeals ignored this precedent and AT&T allots it a feeble footnote. Opp.Br., p. 18 n.22. It is clear, as AT&T suggests, that the court below failed to follow *Kotteakos.* It is not clear *why* it chose to do so, and this Court is therefore respectfully requested to rectify that omission.

In summary, the trial court ignored one of the basic precepts concerning the judicial function. As Justice Frankfurter said, that function is

> "[t]o practice the requisite detachment and to achieve sufficient objectivity [which] no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with . . . judicial power." (*Rochin* v. *California,* 342 U.S. 165, 171-72 (1952).)

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[7] AT&T claims SPCC never seriously advanced the argument that Judge Richey's findings were "clearly erroneous" under Fed.R.Civ.P. 52. On the contrary, it did so repeatedly. "Appellants' Reply Brief," p. 4 n.4 (Jan. 16, 1984); "Petition for Rehearing," pp. 4-8 (July 26, 1984). However, SPCC also said repeatedly that the court below need not reach that issue, given SPCC's arguments on bias and the *Kotteakos* standard of review.

No one here—not even the Court of Appeals or AT&T's own counsel—would deny that this requisite detachment was not displayed by the trial court. The public knows this too, given the high visibility of this lawsuit and AT&T's subsequent advertisements in the media on behalf of Judge Richey's decision. Therefore, the basic question that this Court needs to resolve is: should the image of the judicial process created by the district court's actions go uncorrected? We respectfully submit that it should not.

DATED: February 11, 1985

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